EvansPortenga
Attorneys at Law

Thomas J. Evans

Roy J. Portenga

450 Morris Avenue
Suite 300
Muskegon, MI 49440

231-722-6000
Fax: 231-722-6464
1-800-225-5066

Holland Office
1-616-396-2618

October 14, 2011

Honorable Wayne A. Schmidt
Chair, House Commerce Committee
Anderson House Office Building
S-1388 House Office Building
Lansing, MI 48933
Facsimile: 517-373-9420

RE: House Bill 5002

Dear Chairman Schmidt:

I had the opportunity to talk with you briefly in your office about the above-captioned bill in the past; I have also been at the past two HB 5002 Commerce Committee public hearings. I've submitted cards referencing my opposition to the bill and my desire to speak. I've just been advised the next public hearing is scheduled for 10/19/11 at 10:30 a.m. I'm on the Board of Trustees at Muskegon Community College and unfortunately our October public meeting conflicts with your hearing. Accordingly, I'm faxing what I would say if I had the opportunity. I'm also sending 30 copies of this letter via One-Day-Mail with the request that you please distribute them to your committee members.

THE HEART OF THE ISSUE

In listening to comments so far, I'm struck by the fact the supporters of the bill only emphasize the Trammel-specific loss issue and the "just cause discharge" issue as though these were the heart of the proposed act. They are not; these are marginal issues over which you will find little disagreement from the Plaintiff's Bar. The heart of the proposed law is found in the definition of disability as set forth in Section 301. You'll note the proponents have said little about Section 301---in my humble opinion, purposely so.

Please remember Workers' Compensation is a "system" that applies to approximately 4 million workers in the State of Michigan. The purpose of the Act is to get benefits to injured employees quickly so that they don't miss house payments, etc. Moreover, the Act was set up to give incentive to employers and employees alike to get the

employee back to work quickly. With this as background, I'll provide you with a brief, practical hypothetical and point out how the old law, the existing Sington/Stokes scenario, and HB 5002 handle the facts.

HYPOTHETICAL

Assume: 37-year old employee who works for a small town grocer as a warehouse worker/stocker where he's on his feet all day; has a high school education; is paid $12.00 per hour; has worked for the grocer many years; grocer genuinely likes the employee and the employee's family and is delighted to have him as an employee; employee very much likes and respects the grocer; 17 years before, the employee worked the best paying job he ever had---one year as a cab driver making $14.00 hour plus tips, a job he hated and quit. The employee is capable of working a Walmart sit/stand option greeter job down the street which pays $9.00 per hour.

A pallet of product shifts while the employee is moving it with a hand jack and heavy boxes fall onto and severely fracture his left leg. Employee's orthopedic surgeon says he has to do sit/stand option work for the next six weeks, a restriction that does not permit him to return to work for the grocer for the six weeks.

OLD LAW

At the last public hearing you heard a representative of the UAW who was involved in negotiating the 1987 definition of disability in the Act. The definition is found at Section 301(4) and states a disability means "a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work-related disease." Before the Sington v Chrysler Corp., 467 MI 144 (2002) case, work comp judges interpreted the law literally (as they should have) and in a way, per the UAW representative's testimony, consistent with the intentions of the parties.

Applying the disability definition to the above hypothetical, the employee had "a limitation" in his wage earning capacity (he could no longer perform his warehouse/stocking job). After initial insurance company paperwork is done, the employee would receive his first check within three weeks (paid retroactive back to his first day off) and he would receive benefits for the remainder of the six weeks; no house payments are missed.

SINGTON/STOKES

I won't go through all the steps that the Supreme Court requires injured employees and insurance adjusters to go through to establish disability for the six weeks at issue under the Sington/Stokes cases because it will take too long. Also, a complete analysis would require each side to hire vocational experts. It's that complicated (and that's why some changes to the Act are necessary).

HB 5002

According to HB 5002 Section 301(4)(A), the employee first has to establish his injury "results in the employee's being unable to perform **all** jobs paying the historical maximum wages in work suitable to that employee's qualifications and training including work that may be performed using the employee's transferrable work skills." In our hypothetical, the employee will receive **no** weekly work comp as he can still drive and thus can drive a taxi---a job which used to pay him $14.00 an hour. The employee cannot receive group disability benefits, even if the employer had such benefits, as those benefits only pay for non-work-related conditions. Employee misses one, maybe two house payments. Grocer is not happy as he paid premiums for work comp insurance and now his employee (and the employee's family), who he very much likes, suffers.

Assume for a moment the employee never worked as a taxi cab driver and that his best paying jobs to which his skills and qualifications transfer are all $12.00-an-hour jobs, including a $12.00-an-hour sit/stand cashier's job. Because he can do the sit/stand option cashier job, he gets no benefits. House payments, again, are missed.

Next, lets simply assume that the **only** job the employee's qualifications and training prepare him for are on-your-feet-all-day jobs which typically pay $12.00 per hour. So now, under Section 301(4)(A) he meets the first test of disability, i.e., the injury resulted in his "being unable to perform all jobs paying the historical maximum wages...." Now, the "virtual wage" issue comes into play. According to proposed Section 301(4)(A), "a disability is partial if the employee retains a wage earning capacity at a pay level less than his or her historical maximum wages in work suitable to his or her qualifications and training." Proposed Section 301(4)(B) then defines "wage earning capacity" as "the wages the employee earns or is capable of earning, whether or not actually earned."

In our hypothetical, the employee can still do a sit/stand option Walmart greeter job paying $9.00 per hour. So his disability is "partial."

Proposed Section 301(6) states that when a disability is partial, "the employer shall pay or cause to be paid to the injured employee...weekly compensation equal to 80% of the difference between the injured employee's after tax average weekly wage before the personal injury and the employee's wage earning capacity after the personal injury." Remember, wage earning capacity is defined as what the employee earns "or is capable of earning, whether or not actually earned." So in our hypothetical, the insurance company only has to pay 80% of the after tax difference between a $12.00 an hour job and a $9.00 an hour job, roughly $80.00 per week. It's totally irrelevant whether the greeter job is available, whether the employee is in good faith applying for such jobs, etc. Bottom-line, house payments are missed.

IMPACT

As stated above, please remember Worker's Compensation is a "system" that serves around 4 million Michigan workers. The vast majority of claims are short, closed period claims that are handled by adjusters without the involvement of attorneys. The system, until Sington/Stokes, worked well. Was there some litigation? Yes; there are always a few grey-area cases. But most cases were handled without litigation, workers were promptly paid and went back to work, and house payments were made.

What happens under HB 5002, as noted above, is a sham; employers pay good money for worker's compensation insurance which ultimately doesn't pay much if any weekly benefits. Since there's no such thing as a "free injury", desperate employees under the above circumstances are going to file lawsuits, or file for State Disability Assistance (through DHS), or file for unemployment (he couldn't do his old job but he can do some work), etc. Already threatened mortgage companies (and all creditors) aren't going to appreciate missed payments.

SUMMARY

The heart of the proposed law is to change the definition of disability. There are Democrats and Republications amongst the Commerce Committee and the citizens they represent. While our two-party system forces us to emphasize our differences, let's be frank, on most

issues we agree (that's why we can "live with" spouses, parents, and siblings of the other party!). Why? Because we all have a fundamental threshold of common sense and what we think is fair. HB 5002 goes below this threshold. I respectfully request the Commerce Committee to significantly alter HB 5002.

ALTERNATIVES

The law as it existed before Sington (2002) worked; it simply needs some tweaks. Another alternative is what was worked out and, I believe, submitted to you by the Worker's Compensation Section of the State Bar of Michigan (a group consisting of **both** Plaintiff and Defense attorneys).

Thank you for your kind consideration.

Sincerely,

Roy J. Portenga
/jas
enclosures